In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORPORATION, ET AL., PETITIONERS

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER OF THE BUREAU OF EMPLOYEE COMPENSATION OF THE UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 500 F. 2d 815. The district court's order (Pet. App. 13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1974, and the petition for a writ of certiorari was filed on September 30, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether administrative authority to try an unadjudicated claim for disability compensation under the Longshoremen's and Harbor Workers' Compensation Act lapses due to the employer's termination of payments of compensation made in partial satisfaction of that claim.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, are set forth at Pet. 2-5.

STATEMENT

On July 19, 1960, Charles E. Jones was injured in the course of his employment with Intercounty Construction Corporation. On August 12, 1960, he filed a claim against Intercounty and its compensation insurer, Hartford Accident & Indemnity Company, under the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.*, which makes the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, applicable to employment in the District of Columbia. The claim alleged that Jones had sustained a permanent disability, the extent of which could not yet be determined. Hartford filed an answer to the claim on August 25, 1960, admitting that Jones had sustained a compensable disability but denying "that claimant was permanently disabled to the extent stated in the claim." At the same time, however, Hartford also filed with the Deputy Commissioner of the Bureau of Employee Compensation of the Department of Labor a notice that it had begun paying Jones compensation at the rate of $54 per week, which was then the maximum weekly payment under the Act. Accordingly, the Deputy Commissioner took no action on Jones's claim.

On January 6, 1965, while continuing to make such payments, Hartford filed a notice of controversion of Jones's 1960 claim, specifying that it denied, among other things, the claimed extent of disability. Then, on April 21, 1965, the insurer reduced Jones's weekly payments to $27, based on an assumed 50 percent disability. The payments continued at this reduced rate until January 23, 1968, at which time the aggregate compensation paid to Jones reached $17,280, the maximum liability under the Act for partial disabilities incurred prior to 1961. Since it denied that Jones was permanently and totally disabled, Hartford declined to pay any further compensation.

Two years later, on February 11, 1970, Jones requested a hearing on his 1960 claim for compensation. The hearing was held on December 21, 1970 and January 14, 1971; Deputy Commissioner Walter issued an order on May 24, 1971, ruling that Section 22 of the Longshoremen's Act, 33 U.S.C. 922, barred any award of additional compensation where, as here, the claimant had not filed a second claim within one year of the last voluntary payment of compensation. However, in the course of review proceedings in the United States District Court for the District of Columbia, the Deputy Commissioner consented to an order of remand, and upon remand he issued a new order, ruling that since Jones's timely 1960 claim had never been adjudicated, he had not been required to file a new claim upon termination of the employer's voluntary payments, and finding that Jones was in fact permanently and totally disabled as a result of the 1960 accident.

This action was then brought in the same district court by Intercounty and Hartford, requesting injunctive relief against the Deputy Commissioner's compensation order on the ground that Section 22 of the Act

permits the issuance of such an order after the termination of voluntary payments only if the claimant files a new claim within one year of that termination. The district court, relying upon *Strachan Shipping Co.* v. *Hollis,* 460 F.2d 1108 (C.A. 5), certiorari denied *sub nom. Lewis*, v. *Strachan Shipping Co.*, 409 U.S. 887, agreed with petitioners' construction of the Act and accordingly enjoined the Deputy Commissioner from implementing the challenged order. The Deputy Commissioner appealed, joined by Mary Jones, the claimant's guardian. The court of appeals reversed, and in doing so expressly stated its disagreement with *Strachan Shipping Co.* v. *Hollis, supra.*

DISCUSSION

1. Section 13 of the Longshoremen's Act, 33 U.S.C. 913, requires that claims for disability compensation be filed within one year after the date of injury. It is undisputed that the claimant here filed a timely claim under that provision. Section 19 of the Act empowers the administrative law judge,[1] without restriction as to time, to hear and determine all questions with respect to a timely claim and to issue an order rejecting the claim or making an award. Petitioners contend, however, that an unadjudicated claim lapses when an employer has made, and then terminated, payments of compensation with respect to that claim and the administrative law judge issues no ruling on the claim within one year thereafter. We disagree.

---

[1]The 1972 amendments to the Longshoremen's Act transferred the adjudicatory functions under the Act from deputy commissioners to hearing officers (now administrative law judges) qualified under the Administrative Procedure Act. See 33 U.S.C. (1970 ed., Supp. II) 919(d).

Petitioners rely upon the fact that the one-year period within which an award may be *modified* under Section 22 of the Act begins to run on the date of the last payment of compensation "whether or not a compensation order has been issued." But the significance of that phrase in Section 22 is merely that where payments of compensation have been made without an award, any subsequent award is subject to administrative reconsideration only within one year of the date of the last payment. No provision of the Act causes unadjudicated claims to lapse or places a time bar upon the initial administrative consideration and adjudication of such claims.

2. The decision below is in acknowledged conflict with the Fifth Circuit's decision in *Strachan Shipping*.[2] We agree with petitioners that the conflict should be resolved by this Court.[3]

As Judge Ainsworth noted in his dissenting opinion in *Strachan Shipping, supra*, 460 F. 2d at 1117, the question raised here may affect the rights of many compensation claimants. Indeed, several claims to additional compensation that turn on the resolution of this question are currently pending before Department of Labor administrative law judges. Unless this Court resolves the conflict created by the decision below, there is likely to be protracted litigation over this question in the lower federal courts.

---

[2]Respondent Jones asserts that the cases may be distinguished on the ground that in *Strachan Shipping*, but not here, the Deputy Commissioner had *recommended* the making of a payment. That distinction is unpersuasive. In our view the critical point is that each case involved the initial adjudication of a timely claim and not merely reconsideration of a prior adjudication.

[3]In opposing the petition for a writ of certiorari in *Strachan Shipping*, we took the position that the Fifth Circuit's decision was in error but expressed the view that "in the absence of a conflict between the circuits, review by this Court is [not] warranted" (Pet. App. 18).

CONCLUSION

For the foregoing reasons, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor,

MARSHALL H. HARRIS,
Associate Solicitor,

JOSHUA T. GILLELAN, II,
Attorney,
Department of Labor.

DECEMBER 1974.

DOJ-1974-12